United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-2103

To be argued by
Jon Michael Bevilacqua

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel. NICHOLAS ABATE,

Petitioner-Appellee,

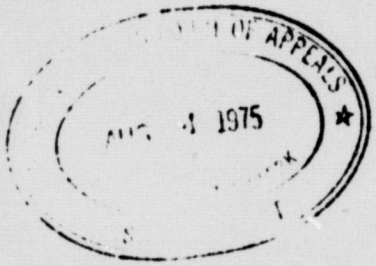
-against-

BENJAMIN MALCOLM, COMMISSIONER OF CORRECTIONS, WARDEN, RIKERS ISLAND PRISON, DISTRICT ATTORNEY OF QUEENS COUNTY,

Respondents-Appellants.

[APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK]

BRIEF FOR RESPONDENTS-APPELLANTS



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UNITED STATES CIRCUIT COURT OF APPEALS
SECOND CIRCUIT

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UNITED STATES ex. rel. NICHOLAS ABATE, :

Petitioner-Appellee, :

-against- :

BENJAMIN MALCOLM, COMMISSIONER OF CORRECTIONS, WARDEN, RIKERS ISLAND PRISON, DISTRICT ATTORNEY OF QUEENS COUNTY, :

Respondents-Appellants. :

----------x

APPELLANTS' BRIEF

Statement of the Issues

Does due process require the state appellate court to state its reasons for refusal to set bail pending appeal?

Preliminary Statement

This is an appeal from the lower court's order (Honorable Thomas Platt) granting the appellee's petition for writ of habeas corpus.

Statement of Case

Appellee was indicted by the Queens County Grand Jury, under Indictment Number 1482/72, for the crimes of criminal possession of stolen property in the first degree

and bribery in the second degree.

A motion to suppress evidence was denied, after a hearing, on April 16, 1973, by the Hon. Joseph J. Kunzeman.

The appellee was then tried before Mr. Justice Albert Buschmann and a jury, and was acquitted on the bribery charge but a guilty verdict was rendered on the charge of criminal possession of stolen property, a class D felony, and appellee was sentenced to a period of one year imprisonment by Hon. Albert Buschmann on May 16, 1975.

On May 30, 1975, the Hon. Henry J. Latham denied appellee's motion for a stay of execution pending appeal with no opinion. Subsequently, on June 17, 1975, Justice Latham also denied appellee's request for reargument. In the stay applications, the appellee's counsel had argued to the Appellate Division on the merits, without furnishing the court with either the record of the suppression hearing or the trial.

An application for a stay was then made to the Hon. Jacob Fuchsberg, Judge of the New York Court of Appeals. Again, appellee did not file the trial or hearing record with his application. Upon this application, the appellant contended that the Court of Appeals was without jurisdiction since Criminal Procedure Law §460.50 (2) (a) specifically limits the request for a stay of execution from a judgment of the Supreme Court to:

> (1) a justice of the Appellate Division of the department in which the judg-

ment was entered, or:

(2) a judge of the Supreme Court of the judicial district embracing the county in which the judgment was entered.

Moreover, it was noted that Criminal Procedure Law §460.50 (3) also limits the request for a stay to "not more than one application." Further it should also be noted that there is no provision authorizing the appeal of an application for a stay. Judge Fuchsberg denied appellee's application.

On July 15, 1975, Judge Thomas Platt, of the United States District Court for the Eastern District of New York, issued an order granting appellee's application for a writ of habeas corpus with the proviso that the enforcement of the writ would be stayed for fifteen days and the writ would be dissolved if, the state court either declared that the writ's denial was based upon the conviction and the trial record and in accordance with §510.30 of the New York Criminal Procedure Law or upon a hearing on motion by appellee, the state court either "grants reasonable bail or supports its denial with such a statement or with findings of facts that would enable a reviewing court to determine whether or not such denial was arbitrary."

Shortly after the lower court's order of July 15, 1975, appellant inquired of Judge Platt's law clerk the procedures for obtaining a stay of the order granting the return of habeas corpus pending our appeal to the United States Court of Appeals and any possible re-argument in view

of this Court's recent decision in Wallace v. Kern, decided June 30, 1975, sl. op. 4545. Appellant was informed by the lower court that Judge Platt would not grant the stay of his order pending our appeal to this Court.

In a supplemental memorandum by Judge Platt dated July 22, 1975, the court stated:

> "All that this court decided was that due process required the Appellate Division to have considered the pre-trial and trial records and give a written statement of the reasons for its denial. See Morrissey, v. Brewer, 408 U.S. 471 (1972) and its progeny." (sl. op. 4551)

ARGUMENT

> DUE PROCESS DOES NOT REQUIRE THE STATE APPELLATE COURT TO STATE ITS REASONS FOR REFUSAL TO SET BAIL PENDING APPEAL.

The appellee in his memorandum of law to the District Court had contended that a state appellate court should state its reasons for denial of a stay of judgment pending appeal.

The appellee in his memorandum of law submitted to the Court below (contained in appendix) at page 4 states:

> Moreover, it is instructive to compare recent rulings requiring written reasons where parole, probation and prisoners' rights are denied or revoked. In Morrissey v. Brewer, 408 U.S. 471, 33 L.Ed 2d 484, 92 S.Ct. 2593 (1972), the Supreme Court held that "minimum due process" requires that a revocation of parole be supported by a written statement detailing the evidence and reasons relied upon for the revocation. This was extended

to revocation of probation proceedings in Gagnon v. Scarpelli, 411 U.S. 778, 36 L.Ed 2d 656, 93 S.Ct. 1956 (1973).

Two years ago, this Court ruled that the New York State Board of Parole must disclose the grounds on which parole is denied in a written statement sufficient to enable the reviewing body to determine whether discretion has been abused. U.S. ex rel. Johnson v. New York State Board of Parole, 363 F. Supp. 416 (E.D. N.Y. 1973), aff'd 500 F. 2d 925 (2nd Cir. 1974), vacated as moot, 42 L.Ed 2d 289.

In accordance with the Supreme Court's advice in Wolff v. McDonnell, 94 S.Ct. 2963, 41 L. Ed 2d 935 (1974), footnote 19, a spate of Federal decisions have come down, requiring prison authorities to state reasons for major changes in the conditions of confinement. See U.S. ex rel. Myers v. Sielaff, 381 F. Supp. 840 (D.Ct. Pa. 1974), where prisoner was denied release to a community work-treatment program; Walker v. Hughes, 386 F. Supp. 32 (D.Ct. Mich 1974) where prisoner was subjected to punitive segregation; and in accord, Willis v. Ciccone, 506 F 2d 1011 (8th Cir. 1974); Fife v. Crist, 380 F. Supp 901 (D.Ct. Mont. 1974). Also, Clonce v. Richardson, 379 F Supp 338 (D.Ct. Mo. 1974) where there was transfer to a special, more rigid prison program; and Romers v. Shauer, 386 F Supp 853 (D.Ct. Col. 1974) where the transfer was out of the prison hospital.

The motion of a fortiori fairly jumps out of these cases, landing on the case at bar with such powerful impact as to make the requirement of supporting reasons for denial of bail go without saying. In each of the above examples, the petitioners had exhausted all appeals; still, the authorities were not permitted by the courts to deal with them as an off-handed, peremptorial way. Can the concept of "minimal due process" mean less here, where petitioner has not had

> his conviction reviewed by an appellate tribunal? Must he serve all, or nearly all of his sentence before appeal, because a single judge, unreviewable under New York law, says so with a stroke of the pen? Is the word "denied," standing alone, to be accorded the respect due only to reasoned judgment under the rule of law?
>
> We submit that no "rational basis" appears here for the denial of bail; indeed, no basis whatever appears. Thus, the faiure of the State Court to enunciate reasons for the denial inexoribly leads to the conclusion that no reasons existed. And that, of course, is the very definition of "arbitrariness."

In a supplemental memorandum by Judge Platt dated July 22, 1975 the Court stated:

> "All that this Court decided was that due process required the Appellate Division to have considered the pretrial and trial records and give a written statement of the reasons for its denial. See Morissey v. Brewer, 408 U.S. 471 (1972) and its progeny." (Slip op. 4551).

The court below thus extended the due process requirement that a parole board state its reasons for denying or revoking parole to a state appellate court in denying a defendant's application for parole pending appeal.

This concept stretching due process to require state appellate courts to indicate reasons to a defendant for refusing him bail on appeal is a cannard. The U.S. Supreme Court in Morrissey v. Brewer, supra, had addressed itself only to parole boards when they mandated that they be required to set down reasons for their refusal to grant parole or revoke probation. The Supreme Court did not intend to

extend this due process requirement to state appellate courts in deciding post judgment bail motions. There is no constitutional right to bail pending appeal. United States ex rel. Kane v. Bensinger, 359 F Supp 181 (N.D. 111 E.D. 1972).

The holding in United States ex rel. Keating v. Bensinger, 322 F Supp 784 (N.D. 111, E.D. 1971) to the effect that the state court's failure to provide any basis for its decision to deny bail created a presumption of arbitrariness was relied on by the lower court despite its mention of United States ex rel. Kane v. Bensinger, supra which held to the contrary.

In United States ex rel. Kane v. Bensinger, supra, and in Starkey v. Swenson, 370 F Supp 594 (E.D. Mo. 1974), the courts held in effect that the burden is on the convicted defendant to show that the state court has acted in an arbitrary fashion and that a presumption or regularity attends the decision on bail. The appellants assert that this is the better view to be adopted in this Circuit.

Moreover, it should be noted by this Court that when the appellee moved for a stay of execution of judgment pending appeal in the Supreme Court of New York, Appellate Division, Second Department, he did not file simultaneously the record of the suppression hearing or the trial. Appellee's counsel also did not file the trial record when he applied to the Hon. Jacob Fuchsberg of the New York State Court of Appeals. Yet the appellee's counsel did argue the merits of his case in discussing the testimony of witnesses without filing a record of the trial or hearing minutes.

Since New York State's Criminal Procedure Law §460.50 provides only for one application for a stay of judgment pending appeal, and counsel did not then file his trial record, and further, the appellee did not request a preference for his appeal in the Appellate Division, pursuant to §670.21 of the New York Code of Rules and Regulations for the September or October terms of the Appellate Division. Due process does not require that the appellee be accorded a fourth opportunity for an application for a stay of execution of judgment.

It should also be noted by this Court that had the appellee wanted a full oral hearing on his post judgment application for bail, he could have moved pursuant to New York Code Rules and Regulations §796.6 and made application to a justice of the Supreme Court, Queens County (Part X or Part X-A). Instead, he waived this opportunity for oral argument to Part X or X-A when he applied directly to the New York State Supreme Court, Appellate Division, Second Department.

The appellants contend that the holding of the lower court is totally unwise and unwarranted and should not be adopted by this circuit.

Although there were no reasons given for the denial of the stay by either the Hon. Henry Latham of the Appellate Division, Second Department, at argument or reargument or Judge Jacob Fuchsberg of the New York Court of Appeals, it is

clear that the failure of the state courts to so articulate reasons does not authorize the federal courts to impose their procedural requirements (which are more liberal and favor release) upon the state courts U.S. ex rel. Walker v. Twomey, 484 F 2d 874, 876 (7th Cir., 1973). In this regard, the Federal Courts have stated that "reliance on a presumption of regularity is appropriate." Johnson v. Zerbst, 304 U.S. 458, 468 (1938) and U.S. ex rel. Walker v. Twomey, supra.

Thus, the appellee is, in effect, seeking a review of a discretionary decision. "If such a decision is desirable, it is for the New York Legislature, and not this Court, to provide therefor." U.S. ex rel. Cameron v. New York, 383 F Supp 182, 184 (E.D. N.Y., 1974). See Hamilton v. State of New Mexico, 479 F 2d 343 (10th Cir., 1973).

Moreover, the appellee has failed to demonstrate that the state appellate court has acted in an arbitrary fashion and has failed to rebut the presumption of regularity.

Further, the lower court's order granting the appellee a writ of habeas corpus directly contravenes the spirit of this court's recent pronouncements as set forth in Wallace v. Kern, slip op. page 4545, decided June 30, 1975. While this Court spoke of the state court's directives of the setting of bail prior to a disposition of a criminal proceeding in the Wallace case, supra, the same logic should perforce apply to a defendant who has been convicted after trial since the presumption of innocence has been dissipated by the

jury's verdict and the defendant thereby is placed in a vastly different situation.

CONCLUSION

THE ORDER OF THE LOWER COURT GRANTING THE WRIT OF HABEAS CORPUS SHOULD BE REVERSED.

Respectfully submitted,

NICHOLAS FERRARO
District Attorney
Queens County

Jon Michael Bevilacqua
Assistant District Attorney
of Counsel
Duly Admitted to Practice
Before This Court.

AFFIDAVIT OF SERVICE BY MAIL

State of New York)
:ss.:
County of Queens)

Barbara A. Raszl, being duly sworn deposes and says that on the 1st day of August, 19 75 she served the within Appellants' Brief upon Paul Chevigney & Paul Goodman in the within action, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Paul Chevigney, Esq.
84 5th Avenue
N.Y., N.Y.

Paul Goodman, Esq.
71-23 Austin St.
Forest Hills, N.Y. 11375

and by depositing the same in the post office box regularly maintained by the United States Government at 125-01 Queens Boulevard, Kew Gardens, New York 11415.

Deponent further says that the said Paul Chivigney & Paul Goodman are the attorneys for the appellee herein and that the address set forth on said wrapper is the office and post office address given by the said attorneys upon the last paper served by them in the within action.

Sworn to before me this
1st day of August, 19 75

Joshua L. Sussman

JOSHUA L. SUSSMAN
NOTARY PUBLIC, State of New York
No. 41-9252855 - Queens County
Term Expires March 30, 19 76

Barbara A. Raszl

QDAO-1017-1/74